United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,472.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

VS.

MONSANTO CHEMICAL COMPANY,
SODA SPRINGS, IDAHO PLANT,
RESPONDENT.

PETITION TO ENFORCE ORDER OF
NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT COMPANY.

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,472.

National Labor Relations Board,
Petitioner,

vs.

Monsanto Chemical Company,
Soda Springs, Idaho Plant,
Respondent.

Petition to Enforce Order of
National Labor Relations Board.

BRIEF OF RESPONDENT COMPANY.

STATEMENT OF THE CASE.

This case is before this Court upon the petition of the National Labor Relations Board, referred to herein as the Board, pursuant to Section 10 (e) of the Labor Management Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter called the Act, for enforcement of its order[1] issued against the Respondent, Mon-

[1] The decision and order of the Board are reported at 108 N.L.R.B. 151.

santo Chemical Company, Soda Springs, Idaho, on May 27, 1954. The Respondent Company challenges the order of the Board sought to be enforced by these proceedings as invalid, improper, and not binding upon Respondent.

The original action was brought under Section 10 (b)[2] of the Act based upon a charge filed by the International Association of Machinists, Local Lodge No. 1933, AFL, hereinafter referred to as the Union, against Respondent. The General Counsel of the Board thereafter issued a Complaint dated December 17, 1953, against Respondent, alleging that Respondent had engaged in certain unfair labor practices within the meaning of Section 8 (a) (1)[3] of the Act (R. 1-4)[4].

The Complaint alleged that at all times since on or about September 28, 1953, the Respondent has refused to permit the Union or its agents and representatives to distribute Union literature to employees of the Respondent's Soda Springs, Idaho, plant upon property of Respondent, including a parking lot, thereby imposing an unreasonable impediment to the freedom of communication essential to the exercise of its employees' right to self organization.

The Answer of Respondent to the Complaint, dated January 8, 1954, denied all allegations of the Complaint that Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act (R. 4-5).

A hearing was held on the allegations set forth in the Complaint at Soda Springs, Idaho on January 20, 1954,

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[2] "Sec. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *"

[3] "Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *"

[4] References to the printed Record will be designated "R".

before Trial Examiner Martin S. Bennett. Evidence adduced at the hearing set forth the fact that Respondent's plant is located about one mile from the town limits of Soda Springs, Idaho, a small rural community of about 2,000 inhabitants (R. 8-9). The plant is situate on approximately 500 acres of ground, partly fenced by a three- or four-strand, dilapidated barbed wire fence (R. 123-124-126). It has approximately 130 employees (R. 125).

Prior to attempts by the Union to distribute literature, the Company had in effect a plant rule as follows:

> Petitions:
>
> Circulating petitions or posting or distributing any literature on Company property without approval of the Plant Manager is prohibited. (R. 10; 137-139; 189)

There is no rule barring solicitation by employees for Union membership at any time, either during working or non-working time. The rule prohibiting distribution of Union literature on Company property has been uniformly enforced against all, but particularly with no anti-Union animus. Indeed, Union representatives testified as to friendly relations existing at all times between the Respondent Company and the Union (R. 10-11).

An integral part of the plant operating unit is the parking lot where Union representatives attempted to distribute their literature to plant employees. When Respondent Company officials pointed out the *No Distributing Rule* in effect, the Union representatives stationed themselves at the intersection of the Company Road and the State Highway. There they made effective distribution of literature to Respondent's employees with complete safety to themselves (R. 74-75; 160-161; 171-174). Other avenues of communication to Respondent's employees were available to Union representatives, but were not utilized by them (R. 121-122).

On February 15, 1954, the Trial Examiner issued hi Intermediate Report, finding that by denying the use o its parking lot for the distribution of Union literatur during the nonworking time of its employees, Responden had engaged in unfair labor practices within the meanin of Section 8 (a) (1) of the Act (R. 6-31).

On March 9, 1954, in accordance with the provisions o Section 102.46 of the Rules and Regulations of the Boar Series 6, as amended, Respondent filed with the Board it exceptions to the Trial Examiner's Intermediate Repor and a brief in support thereof (R. 32-35).

The Board entered its final Order herein on May 2 1954 adopting the Trial Examiner's findings, conclusion and recommendations insofar as they were consistent wit the findings and conclusions of the Board. The Boar found, as did the Trial Examiner, that the Respondent ha engaged in unfair labor practices within the meaning o Section 8 (a) (1) of the Act.

The Board's Decision and Order was not unanimous Member Beeson dissented. He found that the record faile to establish that this case came within the narrow excep tion of the *LeTourneau*[5] case, it being clear that it was no virtually impossible or hazardous for the Union to dis tribute its literature to the employees and, in view of th fact that such use of the Respondent's property by th Union would result in interference with business opera tions and undue hardship, he found that the Responden did not violate Section 8 (a) (1) of the Act, and would therefore, have dismissed the Complaint (R. 38-46).

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[5] N.L.R.B. v. LeTourneau Company of Georgia, 324 U.S. 793.

POINTS AND AUTHORITIES.

I.

THE BOARD ERRED IN FINDING THAT THERE ARE NO SPECIAL CIRCUMSTANCES WHICH JUSTIFY THE NECESSITY OF RESPONDENT'S RULE INSOFAR AS IT PROHIBITS THE DISTRIBUTION OF UNION LITERATURE ON ITS PARKING LOT.

Boeing Airplane Co. v. N.L.R.B. .... F. 2d .... (C.A. 9);

Goodyear Aircraft Corp., 57 N.L.R.B. 502;

North American Aviation, Inc., 56 N.L.R.B. 959;

Tabin-Picker & Co., 50 N.L.R.B. 928.

II.

THE BOARD ERRED IN FINDING THAT THE DISTRIBUTION OF UNION LITERATURE TO EMPLOYEES OFF OF RESPONDENT'S PROPERTY IS VIRTUALLY IMPOSSIBLE, AT TIMES HAZARDOUS, AND THAT IT CANNOT BE READILY CONDUCTED.

N.L.R.B. v. Haddock-Engineers, Ltd., 215 F.2d 734 (C.A. 9);

Ranco, Inc., 109 N.L.R.B. 149.

III.

THE BOARD ERRED IN FINDING THAT THE DECISION IN N.L.R.B. v. LeTOURNEAU COMPANY OF GEORGIA, 324 U.S. 793, IS DISPOSITIVE OF THE PRESENT ISSUE.

Newport News Childrens Dress Co., Inc., 91 N.L.R.B 1521;

N.L.R.B. v. Mooresville Mills, 204 F. 2d 87 (C.A. 4);

N.L.R.B. v. LeTourneau Company of Georgia, 324 U.S. 793;

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490.

ARGUMENT.

I.

THE BOARD ERRED IN HOLDING THAT THERE ARE NO SPECIAL CIRCUMSTANCES WHICH JUSTIFY THE NECESSITY OF RESPONDENT'S RULE INSOFAR AS IT PROHIBITS THE DISTRIBUTION OF UNION LITERATURE ON ITS PARKING LOT.

Prior to any organizational attempts by the Union to distribute literature to employees on the premises of the Plant, the Company promulgated certain rules and regulations by which the Plant would be governed. These rules were printed in a bound volume, entitled *Practices and Policies Manual,* and distributed to all employees (R. 137-140; 189). These regulations were in effect even before they were printed and distributed in August, 1953 (R. 138-139). Included in the regulations inter alia was the following:

> Petitions:
>
> Circulating petitions or posting or distributing any literature on Company property without approval of the Plant Manager is prohibited. (R. 189)

It is conceded by the Trial Examiner that the Company does not bar solicitation for Union membership by employees on Company property. The rule forbidding distribution of Union or other literature on Company property has been uniformly enforced against local businesses and organizations, as well as employees, on a *non-discriminatory* basis (R. 10, 11).

The Board held in at least two cases such a rule as before us did not offend the Act, if enforced on a non-discriminatory basis, as it was in the instant case and so admitted by Petitioner. In the one case, *North American Aviation, Inc.*, 56 N.L.R.B. 959, the Board held:

> "Rule prohibiting distribution of literature or written or printed matter of any description on Company premises is not violative of NLRA; promulgation of such rule by employer does not constitute interference where it is not shown that rule has been *discriminatorily** enforced."

and in the other, *Tabin-Picker and Co., 50 N.L.R.B. 928:*

> "Discharge of most active Union members for distributing Union handbills in plant announcing an open Union meeting was not *discriminatory** inasmuch as, in the interest of keeping plant clean and orderly, it is not unreasonable for an employer to prohibit distribution of literature on plant premises at all times and such restriction had not been *discriminatorily** enforced."

The Board in the instant case erroneously found that the parking lot was not part of the Plant operating area. This finding is wholly contrary to the sworn and uncontradicted testimony of Witness Whiteside, infra. Indeed, it is necessary in order to maintain efficient and continuous operation that it *remain* as an integral segment of the operating unit. To reason otherwise would be to unlawfully burden the Company with reduced operating efficiency and needlessly expose third persons to the possibility of injury (R. 136-137; 141-145). Under these circumstances, the Company was warranted and compelled to adopt the Regulation now in controversy.

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* Emphasis added.

The Plant is situate on 500 acres of land in a somewhat desolate and uninhabited area (R. 193-194—Respondent's Exhibits 4 and 5). The Plant site is partly fenced by a farm-type or rural-boundary-line fence, strung with three or four strands of barbed wire on dilapidated posts. This fence was on the tract when purchased by the Company. The Plant operating unit is only partly fenced. There is no fence surrounding the rear of the property or the north side of the Plant. There is no fence on two sides of the parking lot (R. 123-124; 126; 130).

In particular, the Court's attention is drawn to Respondent's Exhibit 5 (R. 194). This photograph, properly admitted into evidence, shows more clearly than words the untenable nature of the Board's claim that the area in which cars are now parked is not an integral part of the operating unit. An examination of the photograph reveals the parking area in close proximity to the electric furnaces which produce the combustible phosphorus. The photograph clearly reveals, to the near view of the viewer, the absence of any fence. The same examination reveals, in the middle right of the photograph and adjoining the parking area, the coke stock, which is a raw material (R. 124). To the middle left, a gate is shown, composed of wooden logs, clearly visible in the photograph. This represents an artistic endeavor, rather than a gate. The parking lot, the coke, the furnaces, and even the laboratory and office building clearly on the left, are so merged together in the photograph, as they are in fact, that it is indisputable that the parking area and the Plant operating unit are indivisible.

The Trial Examiner found that: ". . . despite the testimony of Plant Manager Whiteside to the contrary, . . . the record will not support a finding that this parking area was part of the plant 'operating unit' ". His decision undeniably was reached ipse dixit and by an arbitrary refusal to accept the sworn and uncontradicted testimony of

Witness J. L. Whiteside, the Plant Manager (R. 11). Such an authority as Corpus Juris Secundum reveals that:[6]

> "Uncontradicted or undisputed evidence should ordinarily be taken as true. More precisely, evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously discredited, disregarded, or rejected,[7] even though the witness is a party or interested; and, unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact; and where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it."

A close examination of the uncontradicted testimony of Mr. Whiteside, arbitrarily rejected by the Trial Examiner, shows conclusively that the parking area and the gate *was and is a part of the Plant operation and within the Plant proper.*

Q. (By Mr. French): *Do you consider, Mr. Whiteside, the parking lot to be within or without the plant proper?**

A. *I consider it within.**

Q. Is that a permanent parking lot?

A. No, Sir. (R. 132)

Q. (By Mr. French): Mr. Whiteside, is this same gate used at any other time by employees for any other purpose?

A. Yes.

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[6] 32 C.J.S. Evidence Sec. 1038 et seq.

[7] *Ariasi* v. *Orient Ins. Co.*, 50 F. 2d 548.

* Emphasis added.

Q. What do they use it for?

A. The building marked "I" on this exhibit is the service building, the main office, the laboratory and the watchman's and because of the multiple installations in their building there is a continuous stream of incoming and outgoing traffic in the course of a 24-hour period in the normal conduct of business.

Q. Would employees on duty have any occasion to use that gate?

A. Oh, yes.

Q. What do they use it for?

A. An employee on duty might use that gate to come to the first aid room. He might use that gate to come to the personnel office. He might use it to come to his locker. He might use it to bring a sample to the laboratory.

Q. What kind of sample would he bring to the laboratory?

A. He might bring a sample of slag from the furnace. He might bring a sample of water that would be contaminated with acid. He might bring a sample of phosphorus. There are, in addition to these samples, other employees who move from a sample preparation room located inside the plant area back and forth to the laboratory preparing samples and taking theirs back to the laboratory for analysis.

Q. The sample of phosphorus that you refer to is the same phosphorus that you have spoken of previously?

A. Yes, Sir.

Q. It is live phosphorus?

A. Oh, yes.

Q. *Mr. Whiteside, do those employees on duty, passing through this gate, do they pass through this gate during the whole span of the operation or are they limited to a certain particular hour? Do you understand the question?**

A. *They might use that gate during any of a 24-hour period.**

Q. *Would you say that gate, in addition to providing egress and ingress for employees, for employees changing shifts, is also a business operation gate?**

A. *Oh, yes.**

Q. (By Trial Examiner Bennett): It is the only gate that employees use, is that correct?

A. Yes could say that almost a hundred per cent, yes. (R. 136-137)

Since the testimony of Mr. Whiteside must be given its true probative value,[8] then ipso facto not only is the gate and parking lot "within the plant proper," but the special circumstances surrounding this area would of sheer operational necessity make it obligatory to prohibit, by Company regulation, the distribution of *any literature* where such action by an individual may be hazardous and dangerous to his person because of proximity to the furnaces. The very nature of the operation of the plant makes it mandatory to preclude unauthorized persons not familiar with the plant operations to freely gain access to the operating area of the Plant. The Company does not desire nor is it required to accept liability for harm that might befall to unauthorized persons seeking freedom of transgression to the Plant area. To permit free and ready trespass to the

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* Emphasis added.

[8] See 32 C.J.S. Evidence, Sec. 1038, supra.

Plant area would indeed be imposing an unconscionable burden upon the Company not required by any State or Federal statute.

In the case of *Goodyear Aircraft Corp., 57 N.L.R.B. 502,* the Board held:

> "An employer may, *in the absence of exceptional circumstances,** prohibit distribution of literature at all times within his plant where production is being carried on in order to protect his legitimate interest in maintaining plant cleanliness, (In re Tabin-Picker and Co., 50 N.L.R.B. 928, 12 LRRM 751, 12 LRRM 244; In re North American Aviation, Inc., 56 N.L.R.B. 959, 14 LRRM 172) and is justified in discharging employees for violation of such rule. We find that the respondent did not adopt its no distribution rule for the purpose of discouraging union organization or for any other objective proscribed by the Act, * * * * and did not enforce such rule in a *discriminatory** manner within the meaning of the Act."

Considering *all the testimony* of Witness Whiteside and the lack of testimony to the contrary, no other result can be reached but that the gate and parking area are within the Plant proper and synonymous with production; and that these special circumstances made necessary the adoption of the *No Distributing Rule.*[9]

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* Emphasis added.

[9] This Court (C.A. 9) in *Boeing Airplane Company* v. *N.L.R.B.,* .... F. 2d ...., and cases cited therein found that special circumstances existed as a legal basis for the rules the company adopted. Although the factual aspects are distinguishable from the instant case, the Court's position in not applying the *Republic Aviation Corp.* rule (324 U.S. 793) can also for the same reason be applied here; to-wit: a finding of special circumstances.

II

THE BOARD ERRED IN FINDING THAT THE DISTRIBUTION OF UNION LITERATURE TO EMPLOYEES OFF OF RESPONDENT'S PROPERTY IS VIRTUALLY IMPOSSIBLE, AT TIMES HAZARDOUS, AND THAT IT CANNOT BE READILY CONDUCTED.

A close examination of the evidence will reveal that literature *was* effectively distributed to Company personnel at the highway intersection[10] (in spite of consistently poor distribution timing by Union organizers Phelan and Wright).[11] On one occasion (4:00 P.M. January 23, 1953) as 25 cars left the Plant all but one car stopped to take the Union literature.

Q. (Mr. Bruckner): About how many cars left the plant at that time, if you can recall?

A. (Mr. Phelan): Well, around 25; perhaps a few more or less.

Q. Did any of them stop?

A. All but one.

Q. And they took literature, did they?

A. Yes, they all took literature after they stopped. (R 75)

Union representatives positioned themselves at or near the stop sign, near the intersection of the Company Road and the State Highway, on 7 different occasions in order to distribute literature. On all but 2 occasions, occupants of cars stopped to take literature.

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[10] The Trial Examiner arbitrarily and capriciously ruled that distribution was ineffectual away from the plant without sufficient evidence or factual support to sustain such ruling. See *N.L.R.B.* v. *Haddock-Engineers, Ltd.*, 215 F. 2d 734 (C.A. 9).

[11] Respondent's Exhibit No. 6 (R. 195) reveals that at no time did Union representatives Phelan and Wright so position themselves at the intersection of the Company Road and the State Highway when the greatest number of the employees leaving and entering the plant could have been contacted.

Arguendo, is it necessary in order to have effectual distribution of Union literature that there be 100% distribution—75%—50%? What criterion does the Board use? A fortiori, is there any compulsion on the part of the employees to accept the distribution of Union literature or any other literature at any place, at any time, under any circumstances? Some cars stopped; some did not. The employes, therefore, exercised their prerogative to accept or reject the literature, which right they had under Section 7[12] of the Act, notwithstanding their inherent constitutional right to reject.[13]

Despite testimony to the contrary the Trial Examiner, with reference to the number of cars that stopped to accept literature on the 1st of October, 1953, at around 8:30 A.M., found that no cars stopped. Mr. Thomas, Personnel Superintendent, testified that *some* cars did stop to receive literature.

Q. (Mr. French): Were you on duty at the plant, Mr. Thomas, on October 1, 1953?

A. (Mr. Thomas): I was.

Q. While on duty did you observe two men passing out literature at the stop sign?

A. I observed them in the afternoon of October 1.

Q. Did you see them in the morning?

A. Yes, I saw them in the morning, too.

* * * *

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[12] "Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection *and also shall have the right to refrain from any or all of such activities** except to the extent that such right may be affected by any agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

* Emphasis added.

[13] The Court of Appeals for the Sixth Circuit, in *G. W. Dickey, et al* v. *N.L.R.B.*, ... F. 2d ...., stated that "Section 7 * * * this is the basic provision of the Act."

Q. Did you see any cars stop and receive literature?

A. Yes, I saw some cars stop.

* * * *

Q. Later, that same day, October 1, did you also observe some men at the stop sign?

A. Yes, I did. I saw them in the afternoon. It was around 4 o'clock, 4:00 P.M., in the afternoon.

Q. And you saw them passing out literature at the stop sign?

A. I did.

Q. Some cars stopped for literature?

A. Some cars stopped. (R. 172-173)

An official State Highway stop sign is located at the juncture of Idaho State Highway 34 and the Company Road. The Company property ends at the stop sign (R. 188). The official State Highway stop sign requires a stop prior to entering the highway from the Company Road (R. 74). The Court is requested to take judicial notice of the Idaho Code in connection hereto.[14] According to law, a driver is required to stop at stop signs (R. 100). In view of the testimony, there can be no question that there definitely is and was on the occasions mentioned, a force-

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[14] I.C.A. (1947) provides:

"40-201. *Designation of Through Highways.* The Commissioner of Public Works is hereby authorized to designate main traveled state highways as through highways.

"40-202. *Right of Way of Traffic.* The traffic on such through highways shall have the right of way over the traffic on any other highway, road or street intersecting therewith; provided, that at the intersection of two through highways the Commissioner of Public Works shall determine which traffic shall have the right of way.

"40-203. *Maintenance of Signs.—Full Stop.* The Commissioner of Public Works shall furnish, erect and maintain suitable standard signs on side roads or streets directing drivers of vehicles approaching a designated through highway to come to a full stop before entering or crossing such through highway, and whenever any such signs have been so erected and maintained, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto."

ful, lawful and noticeable impediment to all automobiles leaving the Company premises. No one interfered with Union attempts to distribute literature at the stop sign (R. 103).

Witness Thomas testified that the confluence of the Company Road and State Highway was a safe place from which distribution of literature could have been and was effectively disseminated.

Q. (Mr. French): In your opinion, Mr. Thomas, looking at Respondent's Exhibit No. 4, is it your opinion that representatives of any organization can stand at the confluence of those two roads on either side with safety to themselves?

A. Yes, in my belief a person could stand there with safety on the side of the road by the stop sign.

Q. (Trial Examiner Bennett): On what is your answer based?

A. Upon observation of people standing out there.

* * * *

Q. The Examiner asked you, I believe, what people. Do you know what people?

A. Yes, I do.

Q. Would you state who they are for the records?

A. I have seen Mr. Phelan and Mr. Wright standing at this position on the plant road.

Q. You say they could stand there with safety. Do you mean there is room for automobiles to pass on either side of them or do you mean something else?

A. I mean they could stand on the side of the road with safety. (R. 160-161)

Respondent's Exhibit 4 reveals persuasive factors confirming the fact that the confluence of the Company Road

and the State Highway is a safe place from which Union representatives could and did effectively distribute their literature (R. 193). At no time during the day or night is there a significant number of cars or employees leaving or entering that they could not be effectively contacted by Union representatives (R. 189-191; 145-146). Respondent employs only a total of 130 people, a small number. They work on 3 shifts and at no time do more than 64 people leave or enter by the Company Road during any one hour; and, during most of the day, travel is non-existent.[15] Testimony most favorable to the Petitioner, and, as reported by the Trial Examiner in his Report, indicated that:

> On January 22, 1953, 6 to 8 cars entered and 6 to 8 cars left (R. 14). On January 23, 1953, 25 to 30 cars entered and 5 to 7 cars left at 8:00 A.M., and at 4:00 P.M. 25 cars left and 7 or 8 cars entered (R. 14). On February 9, 1953, 25 cars left, 7 or 8 cars entered (R. 14-15). On September 28, 1953, 5 cars left (R. 16). On October 1, 1953, 5 to 8 cars left and 6 to 9 cars entered (R. 17).

To find that this amount of traffic from and to the Plant during hourly periods was excessive and hazardous is patently absurd. Even at peak periods of traffic (when Phelan was never present) no danger existed, and at times, the Union representatives deliberately positioned themselves in the center of the road. It must be admitted that no compulsion existed for the Union representatives to so station themselves, but was voluntary. However, even from the center of the road, distribution was effectively made and no hazard existed.

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[15] See Respondent's Exhibit No. 7. This figure includes the cars of both hourly and salaried employees, many of whom ride together.. However, according to Phelan's testimony, he was never present at any time between 7:00 and 8:00 A. M. in the morning on any of his distribution attempts. Nor was he *ever* present during a shift change when he could have reached the maximum number of employees.

The *LeTourneau* case was decided under the provisions of the NLRA (49 Stat. 449; U.S. Code Sup. II Title 29, Secs. 151-166), under which employees did not have the right to refrain from labor activities as *now* provided for in Section 7 of the Act. Quaere, was it the intent of the Congress in giving employees the right to refrain from any and all of such activities under Section 7, to require that the employer shall hold them captive to accept literature[16] from one or more organizers from a labor organization. Arguendo, how many labor organizers representing different unions may be on the site at one time? Soda Springs is a small plant of 130 employees. Within the realm of reason, there could be 130 representatives of different labor organizations on the property. This is what the Board has held in its decision in the instant case. By what tenuous reasoning can the Board find interference under Section 8 (a) (1) of the Act when employees voluntarily refuse to take or stop for literature?

The Act does not provide that non-employees shall have any of the rights guaranteed to employees under Section 7.[17] Of significance is the Board's decision in *Ranco, Inc., 109 N.L.R.B. 149,* wherein the Board states:

> "However, when it comes to the exclusion of strangers from the plant premises the exercise of such privilege does not depend upon an employer being able to affirmatively prove that the rule is justified. Rather, as stated above, the affirmative burden rests upon the General Counsel to prove inaccessibility off the premises, and failing this the outside organizers have

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[16] Legislative History of the Labor Management Relations Act, 1947—Volume 1, page 616: "Eighteenth. The right to go to and from his work without being threatened or molested—Section 12 (a) (1)."

[17] Legislative History of the Labor Management Relations Act, 1947—Volume 2, page 1198: "The National Labor Relations Act, which the pending Bill proposes to amend in Section 7, which the Bill does not touch, does not say anything about the rights of unions. It says that—employees shall have the right * * *."

no right, enforceable by this Board, to come on the employer's premises for organizing purposes."

In the instant case, the General Counsel utterly failed to prove inaccessibility. Failure to contact employees at their homes in person or by mail by the Union was due to the fact that the Union had no roster of employees. The General Counsel adduced no evidence that the Union had ever inquired either to the Company or through employees (R. 22; 175-177) as to a roster or as to employee identities.

Further, many avenues of communication with the employees were not utilized and what attempts that were made by the Union were few, incomplete and desultory (R. 121, 122).

There is an apparent lack of unanimity in the Board's findings relative to the application of the *No Distributing Rule*. The same absence of unanimity is apparent in applying the *LeTourneau* doctrine, if it applies at all, even though the Board says the doctrine is still valid. This view is exemplified by the majority opinion of Members Murdock and Rodgers, the concurring opinion of Chairman Farmer and Member Peterson and the dissenting opinion of Member Beeson in the *Ranco* case, supra; decided subsequent to the instant case.

Overwhelming testimony in the instant case proved that the distribution of Union literature to employees off of Company property is *not only possible and not hazardous,* but by testimony of the Union representatives themselves, a safe and effective method of contacting and reaching employees (R. 74).

III

THE BOARD ERRED IN FINDING THAT THE DECISION IN N.L.R.B. v. LeTOURNEAU COMPANY OF GEORGIA, 324 U.S. 793 IS DISPOSITIVE OF THE PRESENT ISSUE.

The United States Supreme Court decided, in *N.L.R.B.* v. *LeTourneau Company of Georgia, 324 U.S. 793,* that the

employer failed to show unusual conditions or special circumstances to exist in labor relations, plant location or otherwise to justify application of a plant rule against distribution of literature. Also the Court held that the plant *No Distributing Rule* was *discriminatory** against union activity because union employee members were fired for violation of the rule and this action thus discouraged membership in labor organizations. Furthermore, certain plant physical factors and the large number of employees played an important role in the Court's deliberation and subsequent decision.

Supporting Respondent's position are two cases that are authority for the proposition that a ban on distribution of all literature does not constitute a violation of the Act. In both cases, the facts are analogous.

In *N.L.R.B.* v. *Mooresville Mills, 204 F. 2d 87 (C.A. 4),* the Court stated:

> "Employer did not engage in interference by prohibiting Union organizer from distributing Union literature . . . *that the ban on distribution of literature did not constitute a 'serious impediment to the freedom of communication' within the meaning of the Le-Tourneau case.''**

In *In Re Newport News Children's Dress Company, Inc., 91 N.L.R.B. 1521,* the Board stated:

> "It has been well settled since our decision in Le-Tourneau Company of Georgia, cited by the General Counsel, that under some circumstances an employer may not prohibit the distribution of Union literature on his property . . . . . As it appeared in that case that the rule did cause such a serious impediment to self-

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* Emphasis added.

> organization, the Respondent was found to have violated Section 8 (1) of the Act. *But the facts of the LeTourneau case, and similar cases on which General Counsel relies are markedly different from those in the present case.**

Again, a close analogy with the present case. The fact that the employees in the instant case manifested disinterest does not derogate from the effectiveness of contact off of Respondent's premises.

The inapplicability of the first portion of the basis for the Court decision in *LeTourneau* to the instant case, "failure to show unusual conditions or special circumstances to justify application of *No Distributing Rule,*" has been adequately covered in Point I, supra.

The Supreme Court, as a second basis for its decision in the *LeTourneau* case, decided that because of the discriminatory attitude of the Company in enforcing the *No Distributing Rule* by firing two employees who distributed the literature, that, therefore, freedom of communication was impaired under the Act. Does this second test (or standard) apply in the instant case? The discriminatory basis of enforcing the *No Distributing Rule* was controlling and determinative of the result obtained by the Board in *Goodyear Aircraft Corp.*, 57 N.L.R.B. 502, *North American Aviation, Inc.*, 56 N.L.R.B. 959, and in *Tabin-Picker & Co.*, 50 N.L.R.B. 928, supra. Here the application fails completely. Nowhere did the General Counsel show discrimination, Union animosity, or a rule against Union solicitation by employees. On the contrary, it was admitted that the rule was uniformly enforced. No Union animosity. Relations were always of the very best, and there was no rule barring solicitation (R. 10-11; 89).

The Trial Examiner found (which view was adopted by the Board) that the decision in *LeTourneau* is dispositive

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* Emphasis added.

of the present issue and that the facts in the *LeTourneau* case were substantially identical with those present herein. Moreover, the Examiner reached the specious conclusion that the difference in the number of employees was of *no substance* (R. 20). A close examination of the *LeTourneau* case reveals that the Trial Examiner did not examine the facts upon which the Supreme Court based its decision. To conclude that the facts are identical or that the difference is of no substance is incredible. It manifests a definite apathy on the part of the Examiner to find antithetic facts.

The Court stated, 324 U.S. 797:

> "The Company's (LeTourneau) plant for the manufacture of earth moving equipment and other products for the war is in the country on a six thousand acre tract. The plant is bisected by one public road and built along another. There is one hundred feet of company-owned land for parking or other use between the highways and where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, busses or other conveyances on the public roads for communications. The employees' dwellings are widely scattered."

A comparison of the facts in the *LeTourneau* case which the Trial Examiner and the Board find are substantially identical, and in the instant case are as follows:

(1) Soda Springs plant 500 acres—LeTourneau plant 6000 acres.

(2) Soda Springs 130 employees—LeTourneau plant had 2100 employees.

(3) LeTourneau employees dissipated by auto, busses, and other conveyances to dwellings widely

scattered; Soda Springs employees all leave by auto to dwellings of which 67.6% or 88 out of 130 employees are located in Soda Springs, Idaho, a community of 2000 people, one mile away. 23 employees live within a 12-mile radius, and the remaining 19 employees live 17 to 39 miles from the plant (R. 189-191).

(4) LeTourneau plant bisected by heavily traveled highway—Soda Springs plant has one company road converging on a state highway, both infrequently traveled.

Referring again to the *LeTourneau* case, the Trial Examiner stated that:

"The only difference would be in the number of personnel to be reached and the greater amount of distribution required but not in the difficulty of distributing as such." (R. 20)

What greater distinction could have been presented but such a vast and critical difference in the number of personnel? What is more elementary and determinative in law than the distinguishability of facts? There was no showing in the *LeTourneau* case that the parking lot was used in conjunction with plant operations as in the instant case.

The Trial Examiner's Report states:

"If the criteria behind the *LeTourneau* are still valid, namely the *virtual impossibility*"* of distributing literature off employer premises, they would be equally applicable irrespective of the size of the employer or the number of employees involved (R. 20).

Webster's Collegiate Dictionary[18] defines *virtual* as "being in essence or effect, but not in fact"; and definies *impossibility* as being "not possible, incapable of being or

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* Emphasis added.

[18] Webster's Collegiate Dictionary, Fifth Edition, 1948.

occurring''.[19] There is substantial evidence on the record as a whole in this case to preclude the application of the term "impossible". The Supreme Court, we are certain, did not envision applying the decision in the *LeTourneau* case to this case. Were the facts of the present case before the Supreme Court today, the Court, we believe, would not apply the *LeTourneau* decision as determinative or analagous to the issues herein presented.

To support his position the Trial Examiner refers to two cases, he states:

> "Also supporting the position of the General Counsel are two cases whose facts are almost identical with those in the present case. N.L.R.B. v. Carolina Mills, Inc., supra, and N.L.R.B. v. Caldwell Furniture Company, 199 F. 2d 267 (C.A. 4) Cert den 345 U.S. 907. In those cases, the Court of Appeals enforced Board orders setting aside company rules forbidding the distribution of Union literature by Union representatives in a Company parking lot and at a Company gate, respectively, in effect following the LeTourneau decision." (R. 18-19)

The facts in the *Caldwell Furniture Company* case can be distinguished from the issues here to negate the applicability of the decision. The Caldwell Furniture Company employed over 450 workers and the plant was a mile and a half from town. The plant buildings and lumber yard were *completely fenced. No production* carried on outside the fenced area. The Court held, 199 F. 2d 267:

> "Distribution of literature to employees off the Respondent's property is *virtually impossible and, at times hazardous.''**

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[19] 2 ALR 1220.

* Emphasis added.

Again, use of the criteria "virtually impossible" and "hazardous" appear as being determinative of the issues. Again Respondent has proved that these terms, upon which the *Caldwell Furniture Company* case was decided, do not apply to the present case.

In the *Carolina Mills* case, 190 F. 2d 675:

> "The Union representatives were prohibited from distributing Union literature at the main entrance door to the Plant where the employees were changing shifts and at the entrance to the parking lot * * * *The employer offered no evidence of any rule prohibiting the distribution of literature on its property** and in fact permitted such distribution on the parking lot shortly after its interference with the Union."

What are the relevant facts in the *Carolina Mills* case that are applicable to the instant case? Respondent contends there are none and that the case is distinguishable. The Union representatives in the *Carolina Mills* case were employees, and the plant did not have a rule barring distribution of literature. Soda Springs Plant *had in force,* a *No Distributing Rule.* The rule was uniformly enforced.

The *N.L.R.B.* v. *Monarch Machine Tool Company,* 210 F. 2d 183, case is also patently distinguishable on the facts alone. The plant was staffed by 1600-1650 hourly employees, 7/10 of a mile from a town having a population of approximately 12,000 inhabitants. The parking lot where the distribution was attempted was located west of the plant and *separated* therefrom by railroad tracks. The only ingress to the plant from the parking lot was by means of a pedestrian bridge leading from the east border of the parking lot, over the railroad tracks, to the west entrance of the plant. No contention was made that the parking lot was among other things a production area.

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* Emphasis added.

Remington Rand, Inc., 103 N.L.R.B. 125; *Grand Central Aircraft Company*, 193 N.L.R.B. 101; *Glen Raven Silk Mills*, 101 N.L.R.B. 239 enf'd as modified 203 F. 2d 946 (C.A.4); *Carthage Fabrics Corp.*, 101 N.L.R.B. 541; and *George Noroian Company*, 101 N.L.R.B. 112, are cases cited by the Trial Examiner as important to the issues; however, Respondent contends that these cases are also distinguishable on the facts and do not apply, notwithstanding the fact they are distinguishable in the light of Beeson's dissent that the rule may not have been properly applied.

The Labor Management Relations Act[20] and Administrative Procedure Act[21] make it clear that a reviewing court is not barred from setting aside a decision of National Labor Relations Board when it cannot conscientiously find that evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

In *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 490, the Court stated:

> "It is believed that the provision of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in N.L.R.B. v. Nevada Consolidated Copper Corporation (316 U.S. 105 (10 LRRM 607)) and in the Wilson, Columbia Products, Union Pacific States, Hearst, Republic Aviation, and *LeTourneau*,* etc. cases, supra, without unduly burdening the courts.
>
> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts

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[20] 29 U.S.C. Section 160 (e).

[21] 5 U.S.C. Section 1009 (e).

* Emphasis added.

> must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

Furthermore, as pointed out by Board Member Beeson in the Board's decision:[22]

> The rule of LeTourneau case constitutes an exception to the fundamental doctrine that an employer has the right to control the use of his own property. As an exception, it should be strictly limited and not applied in the absence of the overriding considerations given effect by the Supreme Court in LeTourneau. So viewed, the LeTourneau case, in my opinion, is inapplicable here (R. 38-46).

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[22] Pending at this time are three other appeals in as many circuits, which appear to raise the same issue as presented in the instant case. These cases are *N.L.R.B.* v. *Ranco,* 109 N.L.R.B. 149 (C.A. 6); *N.L.R.B.* v. *Babcock & Wilcox,* 109 N.L.R.B. 82 (C.A. 5); and *N.L.R.B.* v. *Seamprufe,* 109 N.L.R.B. 2 (C.A. 10).

CONCLUSION.

The Respondent Company respectfully submits that, for the reasons stated, this Court should deny the petition of the Board for an Order of Enforcement and the Complaint should be dismissed in its entirety.

Respectfully submitted,

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Dated this 5th day of January, 1955.